Supreme Court, U. S.
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No. 79-1473

In the Supreme Court of the United States

OCTOBER TERM, 1979

FELIPE MENDOZA ALVAREZ, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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The petition for a writ of certiorari in this case was filed out of time. The order of the court of appeals denying petitioner's petition for rehearing was entered on November 5, 1979. The time for filing a petition for a writ of certiorari was not extended. Accordingly, the period provided by 28 U.S.C. 2101(c) for filing a petition in this civil case expired on February 3, 1980. The petition was filed on March 20, 1980.

Petitioner apparently contends (Pet. 2) that the 90-day period provided in 28 U.S.C. 2101(c) did not begin until December 20, 1979, when his motion to recall the court of appeals' mandate was denied. This contention is erroneous. A motion to recall the mandate may be filed at any time, even years after the entry of judgment. See

generally C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure: Jurisdiction* § 3938 (1977). Acceptance of petitioner's contention therefore would effectively repeal Section 2101(c). Moreover, even if petitioner's method of computation were proper, the petition would still be untimely because it was filed 91 days after the denial of the motion.

The time limit in 28 U.S.C. 2101(c) is jurisdictional. *Department of Banking* v. *Pink*, 317 U.S. 264 (1942). It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

APRIL 1980